LAW AND CONTEMPORARY PROBLEMS

Volume 54 Summer 1991 Number 3

Foreword

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Despite the seemingly universal introduction of social science methods of instruction, the staples of legal education today differ little from those of many decades ago. Even the most sophisticated modern lawyer continues to remember and understand the basic principles of civil law in terms of rules propounded to resolve discrete disputes between two single parties. If asked to name the foundations of our civil law, the lawyer today, like the lawyer of the 1920s, would almost certainly list *Pennoyer v. Neff*, *Hadley v. Baxendale*, *Brown v. Kendall*, and, perhaps, *Palsgraf v. Long Island R.R. Company*. These cases are recognized today as possessing a certain quaintness, but they remain the building blocks from which our conceptions of civil liability derive.

Regrettably, this conception of civil law is becoming increasingly anachronistic. The caseload of the modern civil judge is less likely to be dominated by an action involving an attempt to collect on a note against land (*Pennoyer*), or damages for delay in delivery (*Hadley*), or for suffering a hit from a stick (*Brown*) or a scale (*Palsgraf*), than by an action involving the joinder of multiple parties with complex third-party liability claims asserting a causative link that requires complicated scientific understanding. However deeply they are revered, our ancient cases provide no more than a starting point for the unravelling of the difficult issues that are progressively overwhelming modern civil litigation.

There should be no surprise, of course, that modern litigation is becoming increasingly complex. Though surely our modern life and standard of living have become more sophisticated, the increased complexity of modern litigation is not solely the result of the advance of technology; it is also the result of our expanding conceptions of civil responsibility and of the broader liability standards that directly derive from those conceptions. Our civil

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liability regime is committed as never before to the careful and comprehensive pursuit of all sources of modern harm, no matter how remote. The increasing complexity of modern litigation necessarily follows.

Although the question has not yet received careful study, it must be accepted that as a civil liability regime adopts more broad and complicated conceptions of liability and damages, it will generate more complex disputes that, in turn, will require a more intricate civil procedure to resolve. The civil procedure well-suited for disputes such as *Brown v. Kendall* or *Palsgraf*, or even the routine auto litigation of the 1950s or 1960s, may not be so well-suited for litigation involving scientific complexity, such as cases arising from use of the defoliant Agent Orange, or class actions, such as those involving asbestos or the Dalkon Shield, where the size of the potential class mushrooms into the tens of thousands or millions, not including those with inchoate claims.

The articles of this symposium address issues implicated by the complexity of modern litigation and the increasingly complicated and voluminous caseload of our modern civil courts. Among them, they analyze the development of the class action device of Rule 23 and other aggregative methods of the Federal Rules of Civil Procedure;[1] the increasing demands for congressional involvement in the problems of excessive costs and delay in the federal courts;[2] the serious problems associated with a procedural system that only loosely constrains the introduction of expert "scientific" testimony[3] and the potential role of non-adjudicative means of evaluating scientific evidence;[4] the incentives and effects of potential changes in cost and fee allocations;[5] and the powers of our civil courts in the context of mass litigation.[6] The articles are attended by excellent commentary by judges and academics.

The articles and comments were initially presented at a symposium entitled "Modern Civil Procedure: Issues in Controversy," held in New Haven, Connecticut on June 15-16, 1990, under the joint sponsorship of the Yale Law School Program in Civil Liability and Aetna Life & Casualty Company. More than 125 judges, practitioners, academics, and corporate executives attended the conference and engaged in spirited debate and discussion. The articles and comments have been extensively revised in response to this excellent commentary. The symposium was intentionally focused upon "issues" and "controversy" because the problems raised by a

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1. Judith Resnik, *From "Cases" to "Litigation,"* 54 L & Contemp Probs 5 (Summer 1991); Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 L & Contemp Probs 227 (Summer 1991).

2. Larry Kramer, *"The One-Eyed are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 L & Contemp Probs 73 (Summer 1991); Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 L & Contemp Probs 105 (Summer 1991).

3. Peter Huber, *Medical Experts and the Ghost of Galileo*, 54 L & Contemp Probs 119 (Summer 1991).

4. Deborah R. Hensler, *Science in the Court: Is there a Role for Alternative Dispute Resolution?*, 54 L & Contemp Probs 171 (Summer 1991).

5. John J. Donohue, III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 L & Contemp Probs 195 (Summer 1991).

6. Peterson & Selvin, 54 L & Contemp Probs 227 (cited in note 1).

civil liability regime that is rapidly changing and developing are less amenable to attempts to contrive some single "solution," than by increasing and accelerated efforts of adaptation in order to preserve our country's commitment to civil justice.